No. 126, Original

In The Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

NEBRASKA'S EXCEPTIONS AND BRIEF IN SUPPORT

JON BRUNING
Attorney General of Nebraska
DAVID D. COOKSON
Deputy Attorney General

JUSTIN D. LAVENE
Assistant Attorney General
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
2115 State Capitol
Post Office Box 98920
Lincoln, Nebraska 68509-8920
(402) 471-2682
Justin.Lavene@nebraska.gov

DONALD G. BLANKENAU
THOMAS R. WILMOTH
Special Assistant Attorneys General
BLANKENAU WILMOTH JARECKE LLP
206 South 13th Street, Suite 1425
Lincoln, Nebraska 68508-2002
(402) 475-7080

Attorneys for State of Nebraska

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

No. 126, Original

In The Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

NEBRASKA'S EXCEPTIONS

JON BRUNING
Attorney General of Nebraska
DAVID D. COOKSON
Deputy Attorney General

JUSTIN D. LAVENE
Assistant Attorney General
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
2115 State Capitol
Post Office Box 98920
Lincoln, Nebraska 68509-8920
(402) 471-2682
Justin.Lavene@nebraska.gov

DONALD G. BLANKENAU
THOMAS R. WILMOTH
Special Assistant Attorneys General
BLANKENAU WILMOTH JARECKE LLP
206 South 13th Street, Suite 1425
Lincoln, Nebraska 68508-2002
(402) 475-7080

Attorneys for State of Nebraska

NEBRASKA'S EXCEPTIONS

The State of Nebraska excepts to the Report of the Special Master as follows:

1. Nebraska excepts to the Special Master's recommendation that, in light of Nebraska's violation of the Republican River Compact, Kansas be awarded $1.8 million, over and above Kansas' actual damages, which "additional amount represents a disgorgement of a portion of the amount by which Nebraska's gain exceeds Kansas' loss." Final Report at 179.

2. Nebraska excepts to the Special Master's conclusion that Nebraska "knowingly failed" to comply with the Republican River Compact. Final Report at 112.

Respectfully submitted,

JON BRUNING
Attorney General of Nebraska
DAVID D. COOKSON
Deputy Attorney General

JUSTIN D. LAVENE
Assistant Attorney General
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
2115 State Capitol
Post Office Box 98920
Lincoln, Nebraska 68509-8920
(402) 471-2682
Justin.Lavene@nebraska.gov

DONALD G. BLANKENAU
THOMAS R. WILMOTH
Special Assistant Attorneys General
BLANKENAU WILMOTH JARECKE LLP
206 South 13th Street, Suite 1425
Lincoln, Nebraska 68508-2002
(402) 475-7080
Attorneys for State of Nebraska

February 27, 2014

No. 126, Original

In The Supreme Court of the United States

STATE OF KANSAS,

Plaintiff,

v.

STATE OF NEBRASKA

and

STATE OF COLORADO,

Defendants.

BRIEF IN SUPPORT OF NEBRASKA'S EXCEPTIONS

JON BRUNING
Attorney General of Nebraska
DAVID D. COOKSON
Deputy Attorney General

JUSTIN D. LAVENE
Assistant Attorney General
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
2115 State Capitol
Post Office Box 98920
Lincoln, Nebraska 68509-8920
(402) 471-2682
Justin.Lavene@nebraska.gov

DONALD G. BLANKENAU
THOMAS R. WILMOTH
Special Assistant Attorneys General
BLANKENAU WILMOTH JARECKE LLP
206 South 13th Street, Suite 1425
Lincoln, Nebraska 68508-2002
(402) 475-7080

Attorneys for State of Nebraska

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

STATEMENT 3

A. History of the Compact and Initial Litigation 3

B. The Instant Proceedings and Special Master's Recommendations 5

SUMMARY OF THE ARGUMENT 8

ARGUMENT 10

I. The Award of $1.8 Million Over and Above Kansas' Actual Damages Is Unsupportable 10

A. Traditional Principles of Contract Law Call for Protection Only of Kansas' *Expectation* Interest 11

B. There Is no Basis for the Additional Disgorgement Award 13

II. Nebraska did Not "Knowingly" Violate the Compact 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

FTC v. Gem Merchandising Corp., 87 F.3d 466 (11th Cir. 1996) 14

Kansas v. Colorado, 1997 WL 33796878 (1997) ... 15, 16

Kansas v. Colorado, 533 U.S. 1 (2001) 8, 9, 15

Kansas v. Nebraska, 538 U.S. 720 (2003) 1

Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275 (1959) 10

Porter v. Warner Holding Co., 328 U.S. 395 (1946) 14

Texas v. New Mexico, 482 U.S. 124 (1987) 8, 9, 10, 12, 13

Texas v. New Mexico, 494 U.S. 111 (1990) 8

STATUTES:

Republican River Compact, Pub. L. No. 78-60, 57 Stat. 86 (1943) ..... *passim*

OTHER AUTHORITIES:

Final Settlement Stipulation, December 15, 2002 ..... *passim*

Kansas v. Nebraska, No. 126 Orig., Second Report of the Special Master (Subject: Final Settlement FSS) (April 15, 2003) 5

Restatement (Second) of Contracts 11, 12, 13

INTRODUCTION

This case stems from the State of Kansas' attempt to enforce rights under the Republican River Compact, Pub. L. No. 78-60, 57 Stat. 86 (1943) ("Compact"). The Compact's provisions were elucidated in the Final Settlement Stipulation ("FSS") signed December 15, 2002 and approved by the Court on May 19, 2003. *Kansas v. Nebraska*, 538 U.S. 720 (2003). Under the terms of the Compact and FSS, Nebraska was required to limit its average Computed Beneficial Consumptive Use ("CBCU") in 2005 and 2006 to the average of its Compact Allocations in those years.[1] Nebraska failed to do so.

Kansas sued Nebraska seeking monetary damages, injunctive relief, and appointment of a River Master to police Nebraska's future compliance activities. Nebraska counterclaimed seeking to conform the Republican River Compact Administration ("RRCA") Accounting Procedures to the express terms of the FSS by adjusting those procedures to ensure Nebraska was not charged, in this proceeding or in the future, for the consumption of water supplies Nebraska imported into the Republican River Basin.

The Special Master found Nebraska violated the Compact and recommends an award of $5.5 million to compensate Kansas. The Special Master recommends the Court deny all other forms of relief sought by

---

[1] Capitalized terms used herein have the meaning ascribed to them in the FSS.

Kansas, including injunctive relief and appointment of a River Master. As to Nebraska's Counterclaim, the Special Master found the RRCA Accounting Procedures contain a technical, mutual mistake and recommends they be reformed to avoid, as the parties intended, Nebraska being charged with the consumption of imported water supplies as if they were Virgin Water Supply.

With regard to Kansas' damage claim and the subject of Nebraska's exceptions, there is no dispute Nebraska violated the Compact in 2006, despite its good faith efforts to comply. The parties, however, have long disputed the appropriate remedy for that violation. Kansas seeks disgorgement of the value of all agricultural production in the Nebraska portion of the Republican River Basin allegedly resulting from the violation (roughly $80 million). Nebraska maintains Kansas is entitled to be made whole by recovery of its *actual* damages, no more. The Special Master recommends a hybrid approach that awards Kansas its actual damages, but then adds $1.8 million, which "additional amount represents a disgorgement of a portion of the amount by which Nebraska's gain exceeds Kansas' loss." Nebraska excepts to this portion of the recommended award, as well as a factual finding on which it appears to be based.

STATEMENT

A. History of the Compact and Initial Litigation.

The Republican River rises in the high plains of northeastern Colorado and western Kansas and Nebraska. The river flows generally in an easterly direction and encompasses approximately 24,900 square miles within the watershed above its junction with the Smoky Hill River in Kansas. The Republican River Basin is underlain by the Ogallala aquifer, except for the lower portion of the Basin in eastern Kansas.

Kansas, Colorado and Nebraska signed the Compact in 1943 to equitably divide the Basin's waters among the States for their efficient use. The Compact divides the Basin's waters based upon the available "Virgin Water Supply" ("VWS") for "Beneficial Consumptive Use." Compact, Art. II. The VWS is defined by the Compact as "the water supply within the Basin undepleted by the activities of man." *Id.* Once the VWS is calculated, it is apportioned to the States in proportion to the original allocations contained in the Compact. Each state is entitled to consume the full amount of its Allocation, but no more than its Allocation through the appropriate averaging period.

In May 1998, Kansas filed a motion for leave to file a Bill of Complaint with the Supreme Court alleging Nebraska was acting in violation of the Compact. At that time, the RRCA Accounting Procedures limited the VWS to surface water and

alluvial groundwater only. Kansas claimed all hydrologically connected groundwater (alluvial and non-alluvial) is subject to inclusion in the Compact accounting for VWS and beneficial consumptive use. Kansas argued that, when including all hydrologically connected groundwater, Nebraska's beneficial consumptive use exceeded its annual allocations.

On January 19, 1999, the Court granted Kansas leave to file its Bill of Complaint. Nebraska and Colorado filed Answers and Counterclaims. On June 21, 1999, the Court invited Nebraska to file a motion to dismiss on the issue of whether groundwater consumptive use was regulated by the Compact. Nebraska filed its motion to dismiss on August 2, 1999. After briefing by all States and the United States, the Court referred the matter to Special Master Vincent L. McKusick on November 15, 1999. On January 28, 2000, Special Master McKusick recommended that Nebraska's motion to dismiss be denied and that all water uses that deplete streamflow be included in Compact accounting.

In May 2001, following additional rulings by Special Master McKusick, the States began discussing a settlement. After various negotiations, the States requested, and the Special Master agreed, to postpone the progression of the case until December 15, 2002, to allow the States to explore settlement. Those negotiations culminated in the FSS.

The FSS resolved all pending litigation and disputes between the States that existed as of December

15, 2002, and provided for dismissal with prejudice of Kansas' Bill of Complaint. In the FSS, the States agreed to, among other things: (1) a moratorium on the construction of new wells in the Basin upstream of Guide Rock, Nebraska, with certain exceptions listed in the FSS; (2) the development of a groundwater model (the "Model") to determine stream-flow depletions caused by well pumping and the credit for water imported into the Basin (known as the "Imported Water Supply Credit"); (3) revised RRCA Accounting Procedures, which would be used to determine Compact compliance; and (4) a procedure to resolve disputes relating to Compact administration. *See generally* the FSS and *Kansas v. Nebraska*, No. 126 Orig., Second Report of the Special Master (Subject: Final Settlement FSS) (April 15, 2003).

B. The Instant Proceedings and Special Master's Recommendations.

The FSS contemplates Nebraska will further limit its CBCU when conditions warrant so-called "Water-Short Year Administration." FSS § V.B. By the express terms of the FSS, 2006 was the first year Nebraska could be subjected to Water-Short Year Administration and the corresponding reductions in CBCU required under those conditions. FSS, Appx. B. Despite its good faith efforts to comply, Nebraska failed to further limit its CBCU as required.

On December 19, 2007, Kansas informed Nebraska and Colorado of its intent to pursue remedies for

the violation. Invoking the FSS' Dispute Resolution provisions, FSS § VII, Kansas initiated arbitration in 2008. In material part, the Arbitrator returned an award of just $10,000 based on Kansas' failure to prove any actual injury arising from Nebraska's violation. The Arbitrator further recognized a problem presented by the RRCA Accounting Procedures, but awarded against Nebraska's proposed solution. Kansas then sought leave to file a Bill of Complaint in this Court seeking damages and injunctive relief. The Court granted Kansas leave to file the Bill of Complaint. Nebraska counterclaimed to correct the RRCA Accounting Procedures.

The Court appointed the Honorable William J. Kayatta in May 2011 as Special Master to oversee the proceedings. The Special Master received initial briefings on the Parties' respective positions on various issues, including the propriety of correcting the RRCA Accounting Procedures and the scope of Nebraska's Compact violation. An expedited discovery period followed, and trial was set for August 2012.

In May 2012, Nebraska and Colorado agreed on the proper solution to the problem presented by the RRCA Accounting Procedures. The agreed upon solution differed from the initial solution Nebraska previously arbitrated. The Special Master granted leave for Nebraska and Colorado to proceed with the modified solution and afforded Kansas additional time to address it. Trial was conducted in Portland, Maine from August 13 to 23, 2012.

Because Kansas claimed prejudice from Nebraska's and Colorado's revised solution, the Special Master afforded Kansas additional time to evaluate and respond to the solution, and the proceedings were extended a full year to August 2013. A final supplemental hearing was conducted on August 17, 2013. The Special Master issued his Report on November 15, 2013.

As to Kansas' claims, Nebraska agrees with the Special Master's conclusions that: 1) Nebraska exceeded its allocation during the relevant compliance period by 70,869 acre feet; 2) Nebraska is not responsible for bearing the accounting charge attributable to evaporative losses from Harlan County Lake during 2006; 3) a reasonable (if unproven) approximation of Kansas' actual damages, for which Kansas is entitled to compensation, is $3.7 million; and 4) all other forms of relief sought by Kansas, including injunctive relief and appointment of a River Master, should be denied.

As to damages arising from Nebraska's breach, the Special Master recommends Kansas be awarded an additional $1.8 million in disgorgement designed to "move[ ] substantially towards turning the actual recovery by Kansas, net of reasonable transaction costs, into an amount that approximates a full recovery from the harm suffered." Final Report at 179. Nebraska excepts to this additional disgorgement award for the reasons explained below.

As to Nebraska's counterclaim, Nebraska agrees with the Special Master's conclusions that: 1) the

parties to the FSS committed a mutual mistake leading to the inadvertent and improper consumption of imported water supplies that form the basis of the Imported Water Supply Credit; and 2) the RRCA Accounting Procedures should be reformed to correct that mistake, as recommended by the Special Master, for the accounting year 2007 and thereafter.

SUMMARY OF THE ARGUMENT

The Court should sustain Nebraska's exception to the Special Master's recommended award of an additional $1.8 million based on the theory of "disgorgement." This Court previously held, in *Texas v. New Mexico*, 482 U.S. 124 (1987), that where an interstate water compact failed to specify a specific form of relief, the Court has discretion to award the aggrieved State "a suitable remedy, whether in water or money." It subsequently entered a stipulated judgment ordering New Mexico to pay $14 million to Texas arising from the former's violation of the Rio Grande Compact. *See Texas v. New Mexico*, 494 U.S. 111 (1990). The Court later approved an award of money damages to Kansas based on a Special Master's recommendation that the award be based on the actual loss suffered by Kansas. *Kansas v. Colorado*, 533 U.S. 1 (2001) (involving the Arkansas River).

What the Court has never before held is that a State found to have acted without malice or nefarious intent, but nevertheless in violation of an interstate compact, should be forced to pay a damage award

premised on the alleged (yet unproven) benefit accruing to the State as a consequence of its violation. Extending this Court's rulings in *Texas* and *Kansas*, the Special Master has suggested just that. The Special Master recommends an award of $1.8 million in "disgorgement" on top of an award equal to the actual damages suffered by Kansas. Even the Special Master recognizes such an award is unprecedented. Final Report at 133.

The Compact and the FSS fundamentally remain contracts, and traditional contract principles should be observed in the absence of extraordinary circumstances. Those principles call for making Kansas whole, but no more. While the Court might possess a general equitable power to rely on disgorgement where the facts so demand, there is simply no basis for the exercise of such power in the instant case.

The Special Master specifically found no evidence of intentional or deliberate acts by Nebraska officials. To the contrary, the evidence shows Nebraska's persistent and earnest, if imperfect, efforts to comply with the Compact. These efforts included a revolutionary reformation of Nebraska water law following the signing of the FSS and myriad water acquisitions, conservation programs, and related efforts to reduce overall consumption in Nebraska. Moreover, these efforts facilitated a reduction in groundwater pumping of over 500,000 acre-feet from the time the FSS was signed (2002) until the point of non-compliance event (2006). Final Report at 111.

The recommended disgorgement award appears to be based, at least in part, on the Special Master's

erroneous finding that Nebraska committed a "knowing" violation of the Compact. Nebraska excepts to this finding. In order to demonstrate such "knowledge," the evidence would necessarily have to show Nebraska knew *both* the exact size of its Allocation *and* the precise effect its newly initiated, programmatic water management actions would have on water consumption before December 31, 2006. The extraordinary uncertainty at play from 2002 through 2006, coupled with retrospective Compact accounting, rendered impossible the possession of such "knowledge."

ARGUMENT

I. The Award of $1.8 Million Over and Above Kansas' Actual Damages Is Unsupportable.

The Special Master correctly finds the Compact and the FSS are contracts, despite the former also being a statute, and the latter also being a consent decree. *See Texas*, 482 U.S. at 128; *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 285 (1959) (a "Compact is, after all, a contract."). He also correctly finds the FSS is not enforceable through the contempt mechanism because its express terms were not incorporated into the Court's 2003 Decree (and in fact such incorporation effort was stricken from the penultimate draft). The Master thus rightly concludes:

> If Nebraska is to be held liable in this action, it must be held liable for violating the

> Compact, as implemented by the FSS, not for violating any court order. Similarly, any remedy to be awarded should be determined by principles applicable to breaches of a compact, not by principles applicable to breaches of a court order. Final Report at 101.

Notwithstanding this finding, the Special Master departs from the fundamental tenet he establishes.

A. Traditional Principles of Contract Law Call for Protection Only of Kansas' *Expectation* Interest.

Given that the governing documents are contracts at heart, and that neither specifies the precise form of relief in the case of breach, it is appropriate to rely on fundamental contract principles to fill the void. Those principles make clear that Kansas' award should be limited to that necessary to protect its expectation interest under the Compact.[2]

---

[2] Judicial remedies serve to protect one or more of three interests of a contracting party: the expectation interest; the reliance interest; or the restitution interest. Restatement (Second) of Contracts ("Restatement") § 344. The point of awarding damages to protect a party's "expectation interest" is to ensure the party has the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed. In contrast, the "reliance interest" is his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made. The "restitution interest," is his interest in having restored to him any benefit that he has conferred on the other party. *Id.*

Ordinarily, contract damages are based upon the injured party's "expectation interest," as measured by:

a. The loss in the value to the injured party of the other party's performance caused by its failure or deficiency, plus

b. Any other loss, including incidental or consequential loss, caused by the breach, less

c. Any cost or other loss that the injured party has avoided by not having to perform.

Restatement (First cited in note 2) § 347. As explained in Comment (e), therefore, "[t]he injured party is limited to damages based on his actual loss caused by the breach."

The Court's decision in *Texas*, finding that compensation for breach of an interstate water delivery obligation may take the form of money (damages) or water (i.e., specific performance) supports this view. In either case, such award is designed to protect the injured state's expectation interest. Restatement § 358, Comment (a) explains "by exercising its discretion in fashioning the order [of specific performance], the court may be able substantially to assure the *expectations* of the parties without undue difficulty in enforcement, unreasonable hardship to the party in breach, or violation of the law." (Emphasis supplied). Moreover, specific performance is not ordered if money damages would adequately protect the expectation interest of the injured party. Restatement

§ 359. The Court's precedent is rooted in this basic contract law tenet.

The Special Master conducted a proper analysis centered on Kansas' expectation interest under the contract and the FSS. That analysis led to the award of $3.7 million. The Special Master should have ended his analysis at that point; however, he continued on to recommend additional sums be disgorged by Nebraska.

B. There Is no Basis for the Additional Disgorgement Award.

The Special Master offers various justifications for disgorgement of a portion of the so-called "Nebraska gains." Final Report at 132. First, he reasons that "Nebraska took Kansas' water" and that case law supports a disgorgement of real property interests unjustly taken. Final Report at 131. However, Kansas water users were temporarily deprived of their right to use water in 2006, not in perpetuity. Under the Court's prior cases, Nebraska would expect to pay money damages (as the Special Master proposes) or "disgorge" the water taken (as contemplated in *Texas*). Disgorgement in the context of restoring property unlawfully taken is, therefore, merely compensatory and designed to restore the parties to the position they occupied prior to the unlawful act.

Second, the Special Master notes disgorgement has been awarded in cases involving breaches of

federal statutory obligations. Reasoning the Compact is, in part, a federal statute, he finds support in these cases for disgorgement in the instant case. The Special Master's reasoning is deficient because it fails to evaluate congressional intent and policy underlying the relevant statute (here, the Compact) to determine whether the Court's inherent authority to award disgorgement should be exercised to effectuate congress' intent or policy objectives. *See Porter v. Warner Holding Co.*, 328 U.S. 395, 400 (1946); *see also FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 470 (11th Cir. 1996) (discussing *Porter*). The Special Master makes no analysis of the Compact's legislative history. Had he done so, he would have found nothing suggesting disgorgement as an appropriate remedy.

Third, the Special Master indicates the additional award "provides adequate incentive for avoiding further breaches." Report at 186. However, as the Special Master concluded, Nebraska's Integrated Management Plans ("IMP") and actions to be taken thereunder alleviate any concerns about future violations. *Id.* at 116-27. Indeed, the Special Master concludes: "For all of these reasons, the case is compelling that the current IMPs will be effective to maintain compliance even in extraordinarily dry years." *Id.* at 118; *see also id.* at 183 (" I nevertheless found Nebraska's officials who testified at the hearing credible and earnest in their expression of commitment to complying with the Compact.").

Therefore, there is no need to incentivize Nebraska to comply with the Compact.

Ultimately, the Special Master falls back on the inherent discretion of the Court to justify disgorgement. But, even the sole precedent on point appears to counter the Special Master's ultimate conclusion.

By negative implication Special Master Littleworth hinted in *Kansas* that a remedy harsher than ordinary damages might be appropriate if "fairness and equity" compelled a different result. The Special Master cites Littleworth's analysis as support for the general concept that the Court has broad equitable powers to award any remedy it sees fit. The Special Master, however, notes the customary measure of recovery is a party's reasonably foreseeable loss and that *deliberate* breach is required for disgorgement in normal actions. Final Report at 130.

In rejecting Kansas' request to order Colorado to disgorge any benefit it received from compact noncompliance, Special Master Littleworth explained "[t]his is not a case in which Colorado deliberately set out to reap the benefits of a willful failure to perform its obligations under the compact." *Kansas v. Colorado*, 1997 WL 33796878 (1997) at *35. He further explained the "lack of willfulness behind Colorado's violation of the Compact serves to distinguish the cases cited by Kansas in support of its proposed measure of damages." *Id.* at *36. He also concluded that no remedy should result in a "windfall" to

Kansas. *Id.* He made clear that a substantial inequity would result if Kansas' recovery were ever to exceed "what would have occurred had there been no violation of the compact." *Id.*

There is simply no basis for disgorgement under the reasoning set forth by Special Master Littleworth and given the Special Master's conclusions about Nebraska's actions. Similarly, in this case, the Special Master rightly concludes there is no evidence of Nebraska's ill intent. Final Report at 111 ("None of this is to say that Nebraska officials deliberately set out to violate the Compact."); *id.* at 130 ("[T]here is no evidence that Nebraska deliberately opted for non-compliance in 2006.").

Finally, to the extent the Special Master is attempting to compensate Kansas for its "transaction costs" associated with the litigation, the Court should closely review Appendix G of the Final Report. Therein, the Special Master recites the litany of course changes in which Kansas engaged, thereby improperly prolonging the litigation and exacerbating transaction costs for all involved. Nebraska should not have to pay for Kansas' litigation tactics.

II. Nebraska did Not "Knowingly" Violate the Compact.

The Special Master erroneously concludes Nebraska "knowingly failed" to comply with the Compact. Final Report at 112. This finding, which

Nebraska infers provides the Special Master further justification for his disgorgement award, is inaccurate.

The Special Master's first error is his conclusion that hydrologic conditions were "foreseeably varying" such that Nebraska should have better anticipated the extent of the necessary reduction in its CBCU, which would have kept it in compliance. Final Report at 105. As the evidence established, the years 2002-2006 (the four years leading to the violation) presented the entire Basin with an *unprecedented* drought. Compact Allocations were the lowest in the history of the Basin. Because such conditions had never before been experienced, and immediately followed signing of the FSS, it is unfair to suggest Nebraska should have anticipated what never before was known.

The Special Master's second error is his conclusion that Nebraska failed to act promptly to reduce its CBCU after signing the FSS. Nebraska took extraordinary steps to ensure proper implementation of the FSS, including a sweeping revision to the laws governing the interaction of groundwater and surface water in the Basin (and throughout Nebraska) in 2004. Nebraska implemented for the first time multi-jurisdictional, regional IMPs designed to facilitate management of water resources in a manner never before contemplated. Nebraska reduced its overall groundwater pumping dramatically.

The one thing Nebraska did not do is shut down all groundwater pumping in 2006, for which it was roundly criticized by Kansas and, subsequently, the Special Master. However, the reason for this was simple: As all witnesses testified, the elimination of surface water consumption is a far more efficient means of developing "wet water" that can be used in Kansas. Shutting off groundwater users in Nebraska would have yielded little, if any, benefit. Nebraska's efforts, therefore, to purchase surface water in 2006, rather than merely shut off all groundwater users in Nebraska's portion of the Basin, actually provided *more* water to Kansas than would have been available by simply shutting down wells.

This leads to the Special Master's third error: Nebraska somehow knew precisely what it needed to do, but refused to do it. Nebraska's actions took place in the context of an unprecedented drought, coupled with an entirely new legal regime. These novel factors introduced an extraordinary level of challenging uncertainty to be sure. But the greatest uncertainty lies within Compact accounting itself. The RRCA Accounting Procedures call for *retrospective* accounting of CBCU and corresponding calculations of VWS and Allocations. Thus, at the time of the violation it is literally impossible for Nebraska to know its Compact compliance status until the following year. Due to these uncertainties, the simple fact of the matter is that Nebraska could not have known precisely what it had to do in 2006 to ensure compliance because it could not have known its compliance status until early 2007 – when it was already too late.

Nebraska literally could not have known even the scope of its *potential* violation until May 2006. The final accounting numbers are not made available to the States until the fifth month of the year following the year for which the accounting is being conducted. FSS Appx. C, § V. Although in retrospect it became clear that Nebraska was out of compliance with its Compact obligation, until May 2006 it was impossible to define even what *might* be needed to avoid a violation of the first Water-Short Year Administration accounting period.

It is certainly easy today to look back and conclude Nebraska should have taken more aggressive action in years prior to 2006. However, this view fails to appreciate the complexity of integrating groundwater uses and impacts from pumping into Compact accounting for the first time and ignores the effect of averaging embodied in the FSS as a quid pro quo for that process. Indeed, had the unprecedented drought (from 2002 to 2006) ended in 2006 instead of 2007, the dramatic action Kansas now easily identifies as having been necessary to avoid the earlier violation, might have been obviated altogether. Moreover, Nebraska specifically bargained for long-term averaging as part of the settlement, *see* FSS §§ IV.D., V.B., and the Special Master's *post-hoc* admonition that Nebraska should have evaluated and adjusted its water use annually (rather than on the average) undermines the benefit of that bargain.

CONCLUSION

For the foregoing reasons, the Court should overrule the Special Master's recommendation that Kansas be awarded $1.8 million, over and above Kansas' actual damages, along with the Special Master's finding that Nebraska "knowingly failed" to comply with the Compact.

Respectfully submitted,

JON BRUNING
Attorney General of Nebraska
DAVID D. COOKSON
Deputy Attorney General

JUSTIN D. LAVENE
Assistant Attorney General
Counsel of Record
OFFICE OF THE ATTORNEY GENERAL
2115 State Capitol
Post Office Box 98920
Lincoln, Nebraska 68509-8920
(402) 471-2682
Justin.Lavene@nebraska.gov

DONALD G. BLANKENAU
THOMAS R. WILMOTH
Special Assistant Attorneys General
BLANKENAU WILMOTH JARECKE LLP
206 South 13th Street, Suite 1425
Lincoln, Nebraska 68508-2002
(402) 475-7080

Attorneys for State of Nebraska

February 27, 2014